



to prohibit use of the Handbook as a purported learned treatise in order to offer its contents as expert opinions. *See* Fed. R. Evid. 803(18). Finally, Peterson seeks to exclude any use of the Handbook pursuant to the several bases contained in Federal Rule of Evidence 403.

#### ***A. Background Information***

For purposes of background, the Handbook was a product of the Poultry Water Quality Consortium, whose founding members included the NRCS, Tennessee Valley Authority, the U.S. Environmental Protection Agency and U.S. Poultry & Egg Association, an industry trade group. Ex. 1, Dalton Depo. at 23-27. The Handbook was a collection of materials related to agricultural water quality issues including, but in no way limited to, the management of poultry litter and poultry processing plants. *Id.*; *see* Ex. 2, Handbook at PIGEON.0631 (citing to U.S. Department of Agriculture, *Agricultural Waste Management Field Book* (1992)). The Handbook was intended to provide any party of interest with information pertaining to such water quality issues. Ex. 1, Dalton Depo. at 23-27. The Handbook was and was always intended to be an evolving collection of the latest body of commentary regarding this area for use by industry participants and governmental entities as a general reference guide. *See id.* at 136-37; *see also* Ex. 2, Handbook at PIGEON.0614. However, the Poultry Water Quality Consortium ceased to exist in 2003. Ex. 1, Dalton Depo. at 28.

Consistent with the intended purpose, under a cover letter authored by its then Chief Executive Officer, Peterson provided a copy the 150-plus page Handbook to its growers (inside and outside of the IRW) as a guidance document to be used in management of their respective operations, especially with regard to the best management practices contained in the publication. Ex. 3, Henderson Depo. at 58. The cover letter on the version of the Poultry Water Quality Handbook distributed to Peterson's former contract growers stated as follows:

Dear Peterson Grower

The protection of our environment and in particular of our region's water quality is of great importance to Peterson Farms. We, as a company, are committed to doing everything we can to insure generations to come have a clean water supply. You, our growers, have made clear your commitment to the environment.

Peterson Farms feels it is important to provide you with the most up-to-date information on water quality; information that will serve as a tool in managing your poultry operations. This book was written by the Poultry Water Quality Consortium for our industry. Using the information in this book will show your commitment and willingness to be stewards of our environment!

Please take time to review the information in this book. Use it as a resource for making the right choices and following the right management practices in your operation. Peterson Farms will continue to provide you with the most up-to-date information available. Thank you for your time and commitment to this important issue.

Ex. 2, Letter at PIGEON.0613. At the time the Handbook was distributed, Mr. Henderson, at best, "probably" gave the Handbook a "very brief review" before distributing it to Peterson's contract growers. Ex. 3, Henderson Depo. at 56.<sup>1</sup> Likewise, Ron Mullikin, Peterson's part-time environmental liaison, conceded that he has never thoroughly reviewed the contents of the Handbook. Ex. 4, Mullikin Depo. (2007) at 121. Moreover, the one former grower who was questioned about the Handbook admitted that he, too, did not read the entire document. *See* Ex. 5, Pigeon Depo. (5/27/07) at 111.

In any event, Plaintiffs' liberal use of the Handbook during discovery proceedings should be limited at trial, if not altogether excluded, to uses which satisfy one of the exceptions to the hearsay rule. Of note, the general hearsay rule prohibits Plaintiffs from using the Handbook as any one of the following: (1) an admission on the part of Peterson to any portion of the Handbook; (2) a statement against interest; or (3) the basis of expert opinions as a learned

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<sup>1</sup> Of note, in a departure from Plaintiffs' practice of asking deponents for (impermissible) endorsements of portions of the Handbook, Mr. Henderson was not asked to endorse anything in the Handbook and was not asked whether it was his intent at the time he wrote the above-quoted letter to endorse or adopt the Handbook.

treatise. Even if Plaintiffs satisfy the requirements for one or more of the hearsay exceptions, Peterson maintains that use of the Handbook is nonetheless proper pursuant to Federal Rule of Evidence 403.

**B. *The Handbook is not an admissible as an admission***

First, Plaintiffs are prohibited from using, or suggesting that, the Handbook is an admission by party-opponent under Federal Rule of Evidence 801(d)(2). “Admissions are the words or acts of a party-opponent or a representative that are offered as evidence against the party. They may be *express* admissions, which are statements of the opposing party or an agent whose words may fairly be used against the party, or admissions by *conduct*.” JOHN W. STRONG, MCCORMICK ON EVIDENCE § 254, at 447 (4<sup>th</sup> ed. 1992). “[A]dmissions of a party are received as substantive evidence of the facts admitted.” *Id.* § 254, at 448.

When, as here, the putative admission is the written statement of a third party, the proponent must demonstrate the purported declarant affirmatively used the statement as an out-of-court assertion of fact with which the declarant agreed. *See, e.g., Wagstaff v. Protective Apparel Corp. of Am.*, 760 F.2d 1074 (10<sup>th</sup> Cir. 1985) (using “inflated statements” reprinted newspaper articles to further fraudulent scheme); *Grundberg v. Upjohn Co.*, 137 F.R.D. 365 (D. Utah 1991) (using drug interaction report for FDA new drug approval); *State v. Severson*, 696 P.2d 521 (Ore. 1985) (using psychiatric report of State’s expert in support of defense of incompetence); *Pfizer, Inc. v. Teva Pharm. USA, Inc.*, 2006 WL 3041102 (D.N.J. Oct. 26, 2006) (using expert affidavit in support of European patent application).

Of note, the proponent of an alleged admission of a party-opponent bears the burden of proof, by a preponderance of evidence, that the party manifested the intent to adopt a statement as its own. *See United States v. Hall*, 473 F.3d 1295, 1302-03 (10<sup>th</sup> Cir. 2007); *New England*

*Mut. Life Ins. Co. v. Anderson*, 888 F.2d 646, 650 (10<sup>th</sup> Cir. 1989); *Pfizer, Inc.*, 2006 WL 3041102, at \*4.

In the instant case, Plaintiffs are expected to contend that the entirety of the 150-plus page Handbook prepared by the Poultry Water Quality Consortium, as a compilation of scientific and education materials, is an admission on the part of Peterson regarding matters pertaining to the IRW. However, the Handbook is not specific to the IRW, northeast Oklahoma or northwest Arkansas. Instead, the Handbook had its origins in poultry-related activities of the U.S. Department of Agriculture in Alabama and commercial fertilizer production by the Tennessee Valley Authority. Ex. 1, Dalton Depo. at 24. The purpose of the Handbook was to pull together the then-current scientific information and opinions related to water quality issues beyond use of animal manure as a fertilizer into a general reference for purposes of education and discussion. *See id.* at 25, 30-31, 37;<sup>2</sup> Ex. 2, Handbook at PIGEON.0616-17 (listing topics covered in the publication).

As such, nothing in the Handbook can fairly be characterized as an *express* admission on the part of Peterson of any fact or issues pertaining to the IRW or any other specific watershed, either now or at the time it was distributed. Certainly, the general scientific information contained in the Handbook falls short of an admission of the ultimate facts or issues in this lawsuit. Mr. Henderson's cover letter to the Handbook likewise falls short of an admission by *conduct* to everything, or anything, in the Handbook. Similarly, while Plaintiffs could have inquired of Mr. Henderson at his deposition in this case regarding his intent in distributing the

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<sup>2</sup> Mr. Dalton, U.S. Poultry & Egg Association's designated representative, elaborated on the intent of the Handbook as follows: "And the intent was to widely distribute it. If people were interested, here's a compendium of information, some of it gathered from, like I say, from the universities or other purported experts, for your interest. If you're interested in it, here's what we have been able to collect. \*\*\*\* That was part of the objective originally was to find out who's interested, get them talking together so that everybody had the same kind of information." Ex. 1, Dalton Depo. at 37-38.

Handbook, they did not ask the question or otherwise establish a manifested intent to admit or adopt anything in the document on behalf of Peterson, apart from encouraging growers to follow best management practices. *See* Ex. 3, Henderson Depo. at 55-59.

Moreover, the Handbook was not used by Peterson in an affirmative manner like the documents at issue in the aforementioned cases: it was not used to further any scheme; it was not used to support any action taken by Peterson toward anyone, including the growers who received the document; and it was not used to support any assertion of fact made by Peterson. Instead, Mr. Henderson simply referred to the document and distributed it as a recommended “resource” to be used in the management of the growers’ operations at the latter’s discretion. Moreover, from the evidence in the record, neither Peterson nor its growers ever read the entire Handbook. In any event, Peterson has not now or ever manifested any intent to adopt the Handbook or anything contained in it, and thus, it cannot be used as an admission under Federal Rule of Evidence 801(d)(2).

***C. The Handbook is not admissible as a statement against interest***

Second, Plaintiffs are prohibited from using, or suggesting that, the Handbook is a statement against interest under Federal Rule of Evidence 804(b)(3). A statement against interest is an exception to the hearsay rule for an *unavailable declarant* where the statement meets the following standard:

A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.

Fed. R. Evid. 804(b)(3). “To be admissible under rule 804(b)(3), a statement against . . . interest must so far tend to subject the declarant to [civil] liability ‘that a reasonable man in his position

would not have made the statement unless he believed it to be true.’” *United States v. Porter*, 881 F.2d 878, 883 (19<sup>th</sup> Cir. 1989) (quoting *United States v. Chalan*, 812 F.2d 1302, 1311 (10<sup>th</sup> Cir. 1987)). As part of the proponent’s burden on admissibility, the proponent must also demonstrate the unavailability of the declarant and offer corroborating evidence demonstrating the reliability of the purported statement against interest. *See id.* at 882.

In the instant case, the Handbook fails under Rule 804(b)(3) for the same reasons it fails under Rule 801(d)(2). In addition, as a threshold matter, Plaintiffs cannot reasonably contend that Peterson, as a named party to this lawsuit, is unavailable. Moreover, nothing contained in Mr. Henderson’s cover letter or the Handbook falls within the category of statements that are “so far contrary” to any interest Peterson may have with regard to the subject matter of this lawsuit. Furthermore, as previously noted, the general scientific statements in the Handbook cannot subject Peterson to liability on any of Plaintiffs’ claims in this lawsuit. Finally, Plaintiffs have not developed any evidence tending to corroborate the purported “statement.” As such, the Handbook is not admissible under Rule 804(b)(3).

***D. The Handbook is not admissible as a learned treatise***

Third, Plaintiffs should be prohibited from offering any statement in the Handbook as expert opinion, *see, e.g.*, Dkt. #2062 at 20, ¶ 26 (citing the Handbook in support of issues requiring expert testimony), by using the Handbook as a “learned treatise” or otherwise. *See* Fed. R. Evid. 803(18). A learned treatise is an exception to the general hearsay rule, but before statements from the document may be offered into evidence it must meet a number of requirements, to wit:

To the extent called to the attention of an expert upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, *established as a reliable authority* by the testimony or

admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements can be read into evidence but may not be received as exhibits.

*Id.* (emphasis added).

As is plain on the face of the rule, the learned treatise must be established as a reliable authority in the applicable field of study:

Rule 803(18) explicitly requires that to qualify under the learned treatise exception, *a proper foundation as to the authoritativeness of the text must be laid by an expert witness*. Such foundation is necessary to establish that trustworthiness of the treatise as viewed by professionals in that field. Learned treatises are considered trustworthy because “they are written primarily for professional and are subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake.” Failure, therefore, to lay a foundation as to the authoritative nature of a treatise requires its exclusion from evidence because the court has no basis on which to review it as trustworthy.

*Schneider v. Revici*, 817 F.2d 987, 991 (2d Cir. 1987) (citations omitted) (emphasis added); *see Baker v. Barnhart*, 457 F.3d 882, 891 (8<sup>th</sup> Cir. 2006); Fed. R. Evid. 803, Note to Para. (18) (noting that an admissible “treatise is written primarily for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake”).

Plaintiffs have not established through any expert that the Handbook is a “reliable authority” or otherwise satisfies the indicia of reliability expected of a learned treatise. Moreover, a review of the expert reports of Plaintiffs’ various expert witnesses reveals that none of the experts relied on the Handbook as the basis for any of their opinions in this case.<sup>3</sup> In addition, Plaintiffs did not establish through the deposition of the U.S. Poultry & Egg Association representative or otherwise that the Handbook, which has not been updated since the demise of the Poultry Water Quality Consortium, is a learned treatise. Indeed, Mr. Dalton could

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<sup>3</sup> Were Plaintiffs to seek to establish the Handbook as a learned treatise at trial through the endorsement of their experts, Peterson maintains that the testimony would amount to previously undisclosed expert opinions which should be disregarded.



not attest to the reliability of the materials contained in the Handbook. *See* Ex. 1, Dalton Depo. at 37. As such, the Handbook is not an admissible “learned treatise” under Rule 803.

***E. The Handbook should be excluded under Rule 403***

Finally, notwithstanding the foregoing reasons for excluding or limiting the use of the Handbook, the Handbook should be excluded from trial under Federal Rule of Evidence 403, because on the whole it is unfairly prejudicial to Peterson. *See United States v. Schrock*, 855 F.2d 327, 335 (6<sup>th</sup> Cir. 1988) (noting unfair prejudice “refers to evidence which tends to suggest decision on an improper basis”). On the one hand, as discussed, the Handbook has very limited and questionable probative value in this case or any other. The Handbook does not contain any information specific to the IRW, and it likewise does not contain any information specific to Peterson’s operations or those of its former contract growers. Therefore, it would be potentially misleading or confusing to a fact finder if offered into evidence in this matter.

Moreover, the Handbook contains a myriad of scientific information which was collected by parties unknown from sources unknown, bringing into question both the qualifications of those persons whose work is compiled in the Handbook and the reliability of the opinions represented in it. Indeed, the representative of U.S. Poultry & Egg Association, who through the Poultry Water Quality Consortium sponsored the Handbook, could only testify that the scientific information in the Handbook was collected “from universities or other purported experts.” Ex. 1, Dalton Depo. at 37. As such, the reliability of the scientific information contained in the Handbook is and remains suspect, and Plaintiffs have not done anything to verify or validate any the opinions contained in the Handbook.

While Plaintiffs are fully aware of these limitations on the probative value of the Handbook, they have nonetheless used it throughout these proceedings with multiple witnesses,

and—if allowed—will continue to do so at trial, as a convenient, but inadmissible, short-cut to inject facts and opinions into the record, which they contend support their claims in this action. Plaintiffs would, as indicated by their prior use of the Handbook, have the Court substitute the naked content of the Handbook for the live testimony of witnesses, who can testify to facts and opinions that are relevant to the IRW and who, unlike the Handbook, can be cross-examined on these facts and opinions. Such use of the Handbook would be unfairly prejudicial to Peterson and would substantially outweigh the limited probative value of the Handbook. Indeed, allowing a fact finder to make a decision on Peterson's purported liability based on this questionable document fits squarely within the definition of unfair prejudice. *See Schrock*, 855 F.2d at 335. Consequently, use of the Handbook should be excluded at trial for all of the foregoing reasons.

## **II. Conclusion**

For the reasons stated herein, Defendant Peterson Farms, Inc. requests the Court for an Order excluding and/or limiting use of the foregoing categories of evidentiary materials, including any and all testimony, references, attorney statements or arguments.

Respectfully submitted,

By /s/ Philip D. Hixon

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